

6022

Wilson
Civ Serv

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-190442

DATE: April 13, 1978

MATTER OF: J. E. Skowronski - Backpay

DIGEST: Employee initially appointed to GS-12 position claims backpay for period during which he claims he performed duties of position earlier classified at GS-13. Claim may not be allowed. Record indicates that position earlier classified as GS-13 was replaced by employee's GS-12 position and such position was not classified at GS-13 until July 1974 when it was upgraded and the employee was promoted. Also, retroactive temporary promotion and backpay may be granted only for detail to classified position in higher grade.

By letter dated July 25, 1977, Mr. J. E. Skowronski requests reconsideration of our Claims Division's denial of his claim for retroactive promotion and pay adjustment. Specifically, Mr. Skowronski states:

"Your personal intervention is urgently needed with respect to your March 1977 DECISION No. B-133086 providing back pay for unwarranted, unauthorized personnel action which detailed me into a higher graded position for three years as defined in the list of enclosures below. Enclosure 1, 2 and 3 expose personnel action which temporarily detailed me into my current GS-13 Position Description (PD) #4814 at grade GS-12 for 3 years, exceeding statutory 120 days, without the authorization of VA-Central Office mandated in VA Regulation 335A.02a(1)(b).

* * * * *

"Since I was officially appointed into my current position #4814 on 6/3/71, which was officially classified GS-13 on 1/27/69, and VA Central Office has never authorized any classification change as prohibited by enclosed copy of VA Regulation 335A.02a(1)(b), this unbroken lineage of my position #4814 to the present time justifies statutory rights of 'Equal Pay for Equal Work', in compliance with the 'general rule' stated by G.A.O. in enclosure 8, 'an Employee of the Government is entitled to the salary of the position

B-190442

to which he is actually appointed regardless of the duties he performs.'"

Mr. Skowronski's claim for backpay arises in connection with his employment with the Veterans Administration (VA). The record indicates that Mr. Skowronski was hired as a Supervisory General Engineer, GS-801-12, step 1, in June 1971 and assigned to the position of Assistant Chief, Engineering Service, at the Vt. Hospital, Palo Alto, California. He claims that at the time of his appointment, he was told that he would be promoted to the grade of GS-13 upon completion of 1 year in service. On June 25, 1972, upon completion of the waiting period and certification of an acceptable level of competence, he was granted a within-grade step increase to GS-12, step 2. On November 12, 1972, his pay was adjusted to the rate of GS-12, step 7, under the provisions of section 5333(b), title 5, United States Code. He was promoted to GS-13, step 6, on July 7, 1974, and under 5 U.S.C. 5333(b) his pay was adjusted to the rate of GS-13, step 7, on November 10, 1974.

In March 1974 Mr. Skowronski filed a formal complaint alleging that he was not promoted to GS-13 at an earlier date and that his position was otherwise improperly classified as a result of discrimination based on his national origin. The complaints examiner found no evidence of discrimination and, by decision dated December 16, 1974, the VA adopted the complaints examiner's decision, informing the complainant that his claim of discrimination because of national origin was not substantiated by the evidence.

Mr. Skowronski appealed to the Appeals Review Board, Civil Service Commission, complaining of "reduction in my rank; losses of my salary and associated equities; prevention of my promised promotion to the pre-existing grade of my position; continued isolation of me from pre-existing equities and Equal Employment Opportunities of my position; Coercion, Intimidation, Harrassment, and Reprisal." The Appeals Review Board specifically found that the complainant was not discriminated against because of national origin and affirmed the agency's finding. The Board's decision of July 25, 1975, includes the following discussion which is pertinent to Mr. Skowronski's claim for backpay here under consideration:

B-190442

"At the hearing, the Chief of the Engineering Service (complainant's immediate supervisor) testified that before complainant was hired the installation's personnel office classified the position as a GS-13 and the position was previously filled at that level. According to complainant, when he was hired in June 1971 as a GS-12, the supervisor failed in his attempts to get the position upgraded to the GS-13 level. Complainant cited subsequent unsuccessful attempts by the Chief Engineer to promote him (Hearing Transcript, 18-197, including an October 1972 request for an advisory classification from the agency's central office which prevented the classification of complainant's position as a GS-13. (Hearing Transcript, 727 The Hospital Director also testified that attempts to promote complainant were prevented by the classification of the position. (Hearing Transcript, 1447

"The Chief Engineer's perception of complainant's duties did not agree with that of complainant. The supervisor testified that complainant was hired as a GS-12 because he was not ready to assume full responsibility as an Assistant Chief Engineer. (Hearing Transcript, 797 Despite the fact that efforts to promote complainant to the GS-13 level were unsuccessful until July 1974, the file contains no evidence to show that this failure was motivated by discrimination based on complainant's national origin.

"Although complainant contended that he was 'reduced in rank,' 'downgraded,' or affected by 'adverse action,' he failed to provide evidence in support of his contention. As indicated earlier in this decision, a review of the complaint file indicates that the thrust of his complaint is complainant's failure to be hired as a GS-13, and his failure to be promoted to that grade level sooner than he was. The Board notes in this regard that

B-190442

the complainant was advised to consider filing a classification appeal as early as December 1972. His apparent failure to pursue such advice cannot be considered an agency failure or evidence of discrimination."

By letter of January 6, 1975, Mr. Skowronski filed a claim for backpay with our Claims Division complaining of the VA's failure to promote him to GS-13 at an earlier date. His letters dated September 19, 1975, and May 1, 1977, pertaining to his claim, include general allegations of discrimination and references to reprisals, as well as reference to our decision B-183086, March 23, 1977, published at 56 Comp. Gen. 427. Pointing out that it is not within the authority of this Office to rule on allegations of discriminatory promotion practices by Federal agencies and that there is no authority to compensate employees for the costs of preparing and processing claims against the Government, our Claims Division, by Settlement Certificate Z-257473, July 19, 1977, denied Mr. Skowronski's claim for backpay as a result of the VA's failure to promote him at the end of 1 year. In so holding, our Claims Division cited James R. Adcock, et al. v. United States, Ct. Cl. No. 137-72, decided December 19, 1973, 203 Ct. Cl. 257, in which the Court of Claims found that plaintiffs were not entitled as a matter of right to a promotion following completion of a 1-year training program and that an alleged commitment made at the time they were hired could not bind the Government since such a commitment was contrary to pertinent regulations regarding promotions.

In requesting reconsideration of our Claims Division's denial of his claim, Mr. Skowronski asks that we "correct the erroneous record presented by GAO" in the Settlement Certificate. The facts set forth in the Settlement Certificate consist of little more than a recounting of the circumstances of Mr. Skowronski's appointment and promotion, as set forth in the second paragraph of this decision. Since the claimant does not specifically object to any of these facts as inaccurate, we are at a loss to understand his objection that the record is erroneously reflected by this discussion. However, we note that the Settlement Certificate does not specifically address the applicability of our holding in 56 Comp. Gen. 427, supra, to Mr. Skowronski's claim and that he now contends that the position to which he was appointed on June 3, 1971, effective June 21, 1971, was in fact classified as a GS-13 position and that he is therefore entitled to the higher pay of that position for the period prior to July 7, 1974, during which he was

D-190442

compensated at the rate of pay for GS-12. In addition he now claims that his agency illegally cancelled his unresolved January 18, 1974 adverse action appeal, that his supervisor testified falsely at the Appeals Review Board hearing, and that the hearing commissioner refused to accept his evidence.

Regarding this allegation of procedural improprieties in the resolution of his discrimination complaint, the Appeals Review Board, in its July 25, 1975 decision, advised Mr. Skowronski that its decision was final and in the event he was dissatisfied with the determination, he had a right to file a civil action in an appropriate United States District Court within 30 calendar days. This Office is without jurisdiction to entertain an appeal from a determination by the Appeals Review Board with respect to allegations of discrimination. Mr. Skowronski apparently did not exercise his right of judicial appeal and his complaints of procedural error therefore will not be considered.

The resolution of contention that the position to which Mr. Skowronski was initially appointed in June 1971 was in fact a GS-13 position, which was improperly classified as a GS-12 position, is likewise not within the jurisdiction of this Office. As indicated by the above-quoted excerpt from the Appeals Review Board's decision, before Mr. Skowronski was appointed, the position of Assistant Chief, Engineering Service, had been classified at GS-13. At the time of his appointment, the position was classified at GS-12. In his discrimination complaint filed with the Civil Service Commission, Mr. Skowronski alleges generally that the GS-12 position to which he was appointed was established contrary to VA regulations and applicable classification standards. The specific impropriety of which he complains appears to be the purported failure of the VA Central Office to sign the action classifying the position as a GS-13.

Mr. Skowronski's complaint with respect to the classification of his position is in the nature of a classification appeal. The Classification Act of 1949, now codified in 5 U.S.C. 5101 et seq. (1970), governs classification of Federal positions in the General Schedule. Under the statute and implementing regulations in 5 C.F.R. 511.101 et seq., the employee's agency and the Civil Service Commission are primarily responsible for the classification of the duties of the employee's position. With one exception not pertinent here classification actions may not be made retroactive

B-190442

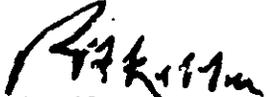
under civil service regulations. Also, the Supreme Court held in United States v. Testan, 424 U.S. 392 (1976), that neither the Classification Act nor the Back Pay Act, 5 U.S.C. 5596 (1970) creates a substantive right to backpay for a period of wrongful position classification. See Matter of Reynold Chavez, B-190124, November 23, 1977, and Matter of Gary K. Neller, B-187861, June 17, 1977.

Mr. Skowronski's claim for backpay for an "unwarranted, unauthorized personnel action which detailed him into a higher grade position for three years" is also based on our holding in Matter of Reconsideration of Everett Turner-David L. Caldwell, 56 Comp. Gen. 427 (1977), supra. In general an employee is entitled only to the salary of the position to which actually appointed regardless of the duties performed. The Turner-Caldwell decision recognizes a limited exception to that general rule. It affirms two earlier decisions, Matter of Everett Turner-David L. Caldwell, 55 Comp. Gen. 539 (1975), and Matter of Marie Grant, 55 Comp. Gen. 785 (1976). These decisions authorize retroactive temporary promotions and backpay for those portions of details to higher grade positions which are in excess of 120 days, provided the requirements for promotion have been met. when the approval of the Civil Service Commission to extend the details beyond 120 days has not been obtained in accordance with paragraph 8-41 of subchapter 8, chapter 300, Federal Personnel Manual. These decisions apply only when the employee is detailed to a position which is classified in a higher grade by competent authority since there can be no promotion to a position which is not classified. Matter of Charles E. Wassner, B-187249, June 17, 1977, and Matter of Hubert J. Buteau, B-187287, May 13, 1977.

The record indicates that since the GS-13 position to which Mr. Skowronski claims he was detailed was not so classified during the period covered by his claim. Although a position similar to that to which Mr. Skowronski was appointed had earlier existed as a GS-13 position, the position was classified as a GS-12 at the time of his appointment and no GS-13 position existed until Mr. Skowronski's position was upgraded to GS-13 in July 1974 at which time he was promoted to the higher grade. The fact that a position has been earlier classified at a higher grade does not provide a basis for payment of backpay where the employee alleges that he performed the duties earlier ascribed to that position. Charles E. Wassner, supra. The employee's proper recourse in such cases is to file a classification appeal, which recourse Mr. Skowronski has chosen not to pursue.

B-190442

Since the record does not support Mr. Siowronski's contention that he was detailed for a prolonged period to the duties of a position classified at a higher grade than the position to which he was appointed, his claim for backpay under Turner-Caldwell, supra, may not be allowed and Settlement Certificate Z-257473, July 19, 1977, is affirmed.


Deputy, Comptroller General
of the United States

APR 13 1978

Director, Claims Division

Deputy
Comptroller General ~~W. H. HILL~~

J. E. Skowronski - B-190442-O.H.

Your file 2-2575473 is returned together with our decision of today denying Mr. J. E. Skowronski's claim for backpay under the Turner-Caldwell case and affirming your Settlement Certificate dated July 19, 1977.

Attachments